IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,	:	CIVIL ACTION NO. 05-5368
Plaintiffs,	:	
v.	:	
ARNOLD LINCOW, ET AL.,	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. FEBRUARY 22, 2007

Defendants Arnold Lincow, D.O., and 7622 Medical Center, P.C. (collectively, Dr. Lincow) have moved for reconsideration of the Court's Order denying Dr. Lincow's oral motion for a stay of proceedings pending resolution of a petition for writ of mandamus with the court of appeals to disqualify the presiding judge (doc. no. 191). For the reasons that follow, the motion for reconsideration will be denied.

I. BACKGROUND[1]

Dr. Lincow moved for the presiding judge's recusal from this

[1] The facts of the dispute are recounted in full in State Farm Mutual Automobile Insurance Co. v. Lincow, 2007 WL 433471 (E.D. Pa. Feb. 8, 2007).

case (doc. no. 155). After a hearing on the record on February 8, 2007, the Court issued a Memorandum denying Dr. Lincow's motion for recusal (doc. no. 188). See State Farm, 2007 WL 433471.

At the February 8, 2007, hearing, counsel for Dr. Lincow made an oral motion that the Court stay proceedings in this case pending the filing and disposition of a writ of mandamus with the Third Circuit Court of Appeals to disqualify the presiding judge from the case. The Court denied the motion for a stay of proceedings, but allowed Dr. Lincow to file a motion for reconsideration if there was a legal or factual basis for granting the stay (doc. no. 187). Dr. Lincow has timely filed a motion for reconsideration (doc. no. 191).

II. DISCUSSION

The Court looks to four factors in determining whether to grant a stay of the proceedings pending the filing and disposition of a writ of mandamus with the court of appeals:

> (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the request is denied; (3) whether other parties will be harmed by the stay; and (4) whether granting the stay will serve the public interest.

Pressman-Gutman Co. v. First Union Nat'l Bank, 2005 WL 174848, at *1 (E.D. Pa. Jan. 25, 2005) (Stengel, J.) (citing Prometheus Radio Project v. F.C.C., 2003 WL 22052896 (3d Cir. Sept. 3,

2003)); see also Harris v. City of Philadelphia, 1995 WL 385102, at *2 (E.D. Pa. June 26, 1995) (Shapiro, J.) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

Here, there is little chance that the Third Circuit will issue a writ of mandamus disqualifying the presiding judge from the case. The Court explained in detail, in its Memorandum of February 8, 2007, the reasons why the presiding judge's recusal is not warranted. See State Farm, 2007 WL 433471. These reasons need not be addressed again here.[2] However, Dr. Lincow has articulated three additional reasons why the presiding judge should be disqualified, all stemming from the Court's Memorandum

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[2] One of the most compelling reasons for denying the recusal motion was that Dr. Lincow failed to identify why, if the basis for recusal was the presiding judge's comments in an earlier case, Dr. Lincow waited 13 months until after the case was filed (and 3 years after the comments were made) to seek the judge's recusal in the case.

In addition, Dr. Lincow claims in his mandamus petition that State Farm's RICO Case Statement, Mr. Hirsh's motion for summary judgment, and State Farm's response to the motion for summary judgment, although never specifically stating that Dr. Lincow is the "unidentified physician" from the Hirsh case, "when compared to the facts of the Hirsh criminal case," "leave no doubt that Dr. Lincow is the 'unidentified physician.'" Pet. for Man. ¶¶ 37-41. These documents were filed April 3, 2006, June 27, 2006, and July 14, 2006, respectively.

Neither the recusal motion, filed December 21, 2006, nor the petition for a writ of mandamus addresses why Dr. Lincow waited so long before seeking the presiding judge's recusal. "It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2d Cir. 1987).

itself.

First, Dr. Lincow argues that the Court erred by treating his motion for recusal under both recusal statutes, 28 U.S.C. § 144 and 28 U.S.C. § 455(a). He contends that (1) the recusal motion was "clear" that it was seeking recusal under § 455(a) and (2) the Court's treating the motion under both statutes demonstrates the Court's bias against him.

As to the former, Dr. Lincow argues that his recusal motion was "clear" that he was pursuing the presiding judge's disqualification only under § 455(a). Mot. for Recons. ¶ 26. This clarity claimed by Dr. Lincow is less than pristine: the motion on its face did not explicitly state which statute it was proceeding under;[3] the motion included citations to cases discussing both § 144 and 455(a); and Dr. Lincow followed the procedure under § 144 by attaching an affidavit (titled "Affidavit of Arnold Lincow, D.O. Under 28 U.S.C. Section 144") asserting his reasons why he believed the presiding judge "has an

[3] The petition for mandamus with the court of appeals, recounting the history below, refers to the recusal motion filed in the district court as "Motion for Trial Judge to Recuse Himself Based on Appearance of Bias pursuant to 28 U.S.C. Section 455(a)." See Pet. for Man. ¶ 3 (emphasis added). However, the actual caption of the recusal motion in the district court was "Motion by Defendants Arnold Lincow, D.O. and 7622 Medical Center, P.C. for Trial Judge to Recuse Himself Based on Appearance of Bias." See Doc. No. 155, at 2. The words "Section 455(a)," which appeared in the petition for mandamus, were not part of the caption in the district court.

unfair bias toward me." Lincow Aff. ¶ 12.[4] Under these circumstances, it was appropriate for the Court to consider the motion for recusal under § 144.

As to the latter, Dr. Lincow contends that the Court's addressing both recusal statutes (§ 144 and § 455(a)), instead of only one recusal statute, demonstrates the presiding judge's bias against Dr. Lincow. It is unclear how the Court's addressing the motion under § 144,[5] in addition to § 455(a), demonstrates that

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[4] Moreover, Dr. Lincow has confused the standard for bias under § 455(a). To determine whether a judge's "impartiality might reasonably be questioned," a court puts itself in the position of a reasonable outside observer. See In re Kensington Int'l Ltd., 353 F.3d 211, 223 (3d Cir. 2003); Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976). However, at oral argument, defense counsel implored the Court to look at the situation from the perspective of Dr. Lincow. See 2/8/07 Trans. at 4. While a litigant, who is personally invested in a case, might believe that a judge is biased against him, a reasonable observer, emotionally detached from the case, can surely conclude that the judge is not biased but is rather simply doing his job.

Similarly, even when the Court rules in Dr. Lincow's favor, he finds fault with the ruling. See Pet. for Man. ¶ 30. For instance, when the Court denied State Farm's motion to disqualify Dr. Lincow's attorney from representing a third-party witness in the case, the Court commented that there was no legal basis for disqualification but that it was probably unwise for the witness to retain a party's attorney. This was a sound legal and practical comment on the merits of the motion, which Dr. Lincow apparently took as a demonstration of bias.

[5] Dr. Lincow also takes issue with the Court's conclusion that the motion for the presiding judge's recusal would be barred under § 144 because the § 144 affidavit was not accompanied by a certificate of counsel attesting to counsel's opinion that it is being filed in good faith. Dr. Lincow argues that, under Federal Rule of Civil Procedure 11(b), when an attorney presents a pleading to the Court, he is "certifying" that the facts in the pleading are presented in good faith. Mot. for Recons. ¶ 28.

Dr. Lincow's petition for a writ of mandamus to disqualify the presiding judge will succeed on the merits. If anything, it shows that the Court took seriously Dr. Lincow's motion by exploring all possible avenues under which recusal might be warranted.

Dr. Lincow's second argument why the presiding judge should be disqualified rehearses once again the argument made in the recusal motion itself: that the presiding judge knew that Dr. Lincow was the "unidentified physician" from the Hirsh case. This argument was previously explored and debunked: the Court's Memorandum explicitly found that the presiding judge did not know Dr. Lincow was the unidentified physician until Dr. Lincow stated so in his motion for recusal and held that even if the presiding judge did know that Dr. Lincow was the physician in question from the Hirsh case, the presiding judge's comments in the Hirsh case would not be legally sufficient to require the presiding judge's recusal in this case. 2007 WL 433471, at *6-7. It is not axiomatic, as Dr. Lincow contends, that the presiding judge would necessarily connect comments he made in a prior criminal case to

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Dr. Lincow has conflated the requirements of Rule 11 and § 144. Rule 11 requires that an attorney's "pleading, written motion, or other paper" be based on the law and known facts. On the other hand, § 144 requires that a party's affidavit stating the alleged basis for the judge's recusal be accompanied by a certificate of counsel attesting to counsel's opinion that the party's affidavit is being filed in good faith. Dr. Lincow's reading would effectively repeal § 144's certificate requirement.

comments in a pleading filed in a civil case, involving a different defendant, three years later.

Dr. Lincow's third argument is that the Court's alleged misrepresentation in its Memorandum that none of Dr. Lincow's co-Defendants supported his motion for recusal demonstrates the Court's bias against Dr. Lincow. The Court's comment that none of the co-Defendants supported the recusal motion was not central to the Court's holding; the presiding judge's recusal would not have been warranted even if Dr. Lincow's co-Defendants had supported his recusal motion. Moreover, the Court's statement was factually accurate. The motion for recusal was filed by only two Defendants, Dr. Lincow and 7622 Medical Center,[6] and there were no statements in the motion itself, on the docket, or at oral argument that demonstrated that Dr. Lincow's co-Defendants supported his motion. The fact remains that Mr. Hirsh, the defendant in the 2003 criminal case referred to by Dr. Lincow, did not take a position on the motion for recusal, and his counsel so attested at the hearing. See 2/8/07 Trans. at 4, 12.

Dr. Lincow argues that the Court should have inferred that all Defendants represented by his attorney supported the motion

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[6] The ECF docket entry is titled "MOTION for Recusal filed by ARNOLD LINCOW, 7622 MEDICAL CENTER, P.C."; the motion is captioned "MOTION BY DEFENDANTS ARNOLD LINCOW, D.O. AND 7622 MEDICAL CENTER, P.C."; and the first paragraph of the motion states "COME NOW Defendants Arnold Lincow, D.O. ('Dr. Lincow') and 7622 Medical Center, P.C. ('7622 Medical')."

for recusal. This is not the case; his attorney's representation of other Defendants is irrelevant. There is no reason that a particular motion cannot be filed on behalf of one defendant but not another, even when the defendants are represented by the same counsel. In fact, Dr. Lincow's attorney filed several other motions on behalf of all of his clients, and he identified all the clients in the caption. See, e.g., Doc. No. 135, at 2; Doc. No. 129, at 2. The ECF docket for this case explicitly shows which parties have filed each motion.[7] Therefore, the Court's statement in its Memorandum that Dr. Lincow's co-Defendants did not support his recusal motion does not demonstrate the presiding judge's bias against Dr. Lincow.

The Court's Memorandum sufficiently explained why recusal or disqualification is not warranted. None of the three reasons now asserted by Dr. Lincow change that analysis. Therefore, the petition for mandamus to disqualify the presiding judge has little likelihood of success on the merits.

The other three factors relevant in granting a stay also weigh in favor of denying the motion for a stay of proceedings. Dr. Lincow will not suffer irreparable harm without a stay

[7] Dr. Lincow is incorrect that a motion is filed on behalf of every defendant identified in the "signature block" after the attorney's name. A motion is filed on behalf of only those defendants who are so listed on ECF and/or identified in the caption of the motion and/or the body of the motion.

because the presiding judge is not biased against him.[8] A stay of the proceedings would adversely impact the other parties to the litigation. The interests of effective administration of justice warrant that this case proceed in a timely fashion.

III. CONCLUSION

Dr. Lincow has not articulated a sufficient basis for staying the proceedings pending the resolution of a writ of mandamus with the court of appeals. Therefore, his motion for reconsideration will be denied.

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[8] Dr. Lincow contends that he will be prejudiced without a stay because the presiding judge's bias will lead him to continue to grant State Farm's discovery motions. This is factually incorrect: the rulings on discovery motions have been relatively even-handed. Of the 15 discovery motions brought by State Farm and directed at Dr. Lincow and/or his associates and/or entities, 5 were granted; 3 were granted in part and denied in part; and 7 were denied. Of Dr. Lincow's 9 discovery motions, 1 was granted; 3 were granted in part and denied in part; and 5 were denied. Importantly, the Court significantly limited Dr. Lincow's production burden by limiting to four months (though State Farm had requested several years) the relevant time period for the production of documents (doc. no. 54) and limiting State Farm's access to Dr. Lincow's bank records. That Dr. Lincow has been required to produce "15,000 documents," see Pet. for Man. ¶ 32, does not explain whether such production was required under Federal Rule of Civil Procedure 26(b) or the extent to which additional production would have been required had the Court not narrowed some of State Farm's sweeping discovery requests.

Taking into account Judge Greenberg's sage remark that "[e]ven-handed justice does not require a judge to balance numerically the rulings in favor of and against each party," Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1043 (3d Cir. 1997), there is no evidence that the presiding judge demonstrated (or is likely to demonstrate) a bias against Dr. Lincow in the judge's rulings on discovery motions.

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O R D E R

AND NOW, this **22nd** day of **February 2007,** it is hereby **ORDERED** that Defendants Arnold Lincow, D.O. and 7622 Medical Center, P.C.'s motion for reconsideration of the Court's order denying the motion for stay of proceedings pending resolution of petitio for writ of mandamus (doc. no. 191) is **DENIED** for the reasons stated in the accompanying Memorandum.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno
EDUARDO C. ROBRENO, J.